

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NICK L. KING

Claimant

VS.

WEIGEL CONSTRUCTION, INC.

Respondent

AND

COMMERCIAL UNION INSURANCE CO.

Insurance Carrier

Docket No. **239,262**

ORDER

Claimant requested review of the April 27, 2007 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on August 7, 2007.

APPEARANCES

Chris Cowger of Lawrence, Kansas, appeared for the claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that claimant had been paid the maximum amount of disability compensation, \$125,000 for a permanent total disability.

ISSUES

The parties agreed claimant suffered a work-related injury on July 12, 1995, when he fell 25 feet through a skylight onto a concrete floor. As a result of the accident the claimant is functionally blind and is permanently and totally disabled. The litigated issues at regular hearing were whether certain medical expenses were causally related to claimant's injuries and whether claimant was entitled to future requested services and medical expenses.

The Administrative Law Judge (ALJ) determined that respondent should provide for the claimant's needs as determined by its life-care planner and provide regular consultations with a neurologist as recommended by Dr. Abrams but otherwise deferred ruling on the past and future medical expenses until approved by the Division's medical administrator.

The claimant requests review of whether the ALJ erred in limiting claimant's medical care for the next two years based on the life-care planning requirements as proposed by respondent's expert and whether the ALJ erred in determining claimant's past and accruing medical expenses should be determined by the Division of Workers Compensation's medical administrator. Claimant argues he is entitled to unauthorized and future medical as well as payment for past medical expenses claimed.

Respondent argues claimant has not met his burden of proof to demonstrate that the claimed medical expenses are compensable under the Act. Respondent requests the Board to find claimant failed to meet his burden of proof regarding requested medical expenses but otherwise affirm the ALJ except that requests for future medical compensation remain within the ALJ's jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant suffered a severe traumatic brain injury which resulted in blindness as a result of his accidental injury at work. The respondent sent claimant to rehabilitation facilities for the blind in Kansas City and Denver, Colorado, in order to assist claimant in becoming independent. Claimant lived with his parents for awhile and then bought his own home.

At a preliminary hearing held on November 1, 2001, the claimant introduced a number of exhibits which were alleged medical billings or itemizations of expenses spent in remodeling his house. The respondent had paid in excess of \$400,000 in medical expenses but questioned whether the submitted bills were related to the accidental injury. The ALJ's Order dated November 6, 2001, noted that there needed to be additional medical testimony to support the requested medical expenses and that issue was taken under advisement. At the regular hearing on October 17, 2006, those issues were again raised. And claimant prepared an itemized listing of additional alleged medical expenses incurred because of his accidental injury.

In general, the expenses are related to remodeling his house, purchase of certain household items, hospitalizations and medications due to seizures.

Dr. Jay Zwibelman, who is board certified in neurology, initially evaluated claimant at the Olathe Medical Center on December 26, 2003. Claimant had been hospitalized after suffering his first seizure. In taking a history the doctor noted claimant had a brief seizure which prompted the hospitalization. The doctor noted there were extenuating circumstances as claimant had been drinking alcohol heavily which could have lowered the seizure threshold. Dr. Zwibelman next saw claimant on March 3, 2005, upon referral from claimant's physician. The doctor noted claimant had suffered a second seizure on December 21, 2004, and claimant had been sleep deprived before the second episode. But Dr. Zwibelman could not say that but for the excessive drinking the claimant would not have had the first seizure. The doctor noted that with post-traumatic seizures there can be a delay as long as 20 years before the onset of seizures but that normally they would occur in the first year or two.

Dr. Zwibelman again examined claimant on November 21, 2006, after claimant had experienced two additional seizures. The doctor determined that claimant's head trauma was a causative factor for the claimant's seizures.¹

Dr. Bernard M. Abrams, who is board certified in neurology, evaluated claimant on April 26, 2006, at the request of claimant's attorney. Dr. Abrams took a history from the claimant, reviewed previous medical treatment records and conducted a physical examination of claimant. Dr. Abrams diagnosed claimant with right eye visual loss with vision of 27/50 and essentially complete visual loss of the left eye, seizure disorder, complete loss of the sense of smell and impairment to his left upper extremity. Dr. Abrams opined that claimant's seizures were caused by his traumatic head injury. Dr. Abrams also reviewed a life-care plan for claimant prepared by Ms. Wingate and agreed with that plan but noted claimant should also see a neurologist three or four times a year.

Both Drs. Abrams and Zwibelman agreed that claimant's head trauma was a causative factor for the claimant's seizures. Accordingly, the claimant has met his burden of proof to establish the seizures were causally related to the accidental injury and hospitalization expenses and medications for the seizure condition are to be paid by respondent upon presentation of itemized billings.

The claimant has failed to meet his burden of proof to establish that the list of repairs and remodeling done to his home were reasonable, necessary or related to his accidental injury. The claimant agreed that when he purchased the house the kitchen remodeling was necessary whether or not someone with vision difficulties was going to live in the house.² Moreover, there was no expert testimony to support the assertion that the remodeling expenses or the medical expenses listed as exhibits at the November 1, 2001

¹ Zwibelman Depo., Ex. 4.

² R.H. Trans. at 32.

preliminary hearing were related to claimant's work-related injury. Consequently, the claimant's request for payment or reimbursement of those expenses is denied.

The claimant's need for future medical needs and appliances as a result of his blindness was addressed by two life-care planning specialists. Tracy Wingate, an occupational therapist and certified life-care planner, met with claimant on November 9, 2005 at the request of claimant's attorney. Ms. Wingate then prepared a life-care plan for claimant. The plan anticipated the projected evaluations with case managers, neurologists, ophthalmologists and eye testing the claimant would need for his lifetime with an associated annual cost. The plan likewise addressed additional training and occupational therapy needs, medical diagnostic testing, aids for independent function, computer requirements, home care, transportation and recreation.

Jacquelyn R. Morris, a registered nurse and certified nurse life-care planner, conducted a home visit with claimant at the request of respondent's attorney. She looked at claimant's cognitive, physical, behavioral and social deficits in order to determine his projected needs. And she reviewed the claimant's medical records as well as his rehabilitation records. Ms. Morris then prepared a life-care plan for claimant that anticipated his future medical care, therapy evaluations and treatment, ongoing diagnostic testing, medications, assistive mobility devices, aids for independent function, home health care, case management services, transportation needs, and vocational/educational/leisure needs.

The Board agrees with the ALJ's determination that respondent provide claimant regular consultations with a neurologist as recommended by Dr. Abrams. The ALJ further ordered respondent to provide the care detailed in Ms. Morris's plan for two years. The Board likewise agrees that Ms. Morris's suggested plan is more reasonable and affirms the determination that respondent provide claimant the items, services and care outlined in her report.³ As the frequency of providing some of the services and items varies from monthly, annually or every 5 years it is further determined respondent is to provide the outlined services for 5 years subject to extension upon agreement of the parties. However, if claimant requires additional future medical treatment or services not adequately addressed or provided for in the life-care plan he can seek such treatment or services upon application to the director.⁴

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated April 27, 2007, is modified to deny claimant

³ Morris Depo., ex. 2,3.

⁴ K.S.A. 44-510k.

reimbursement of certain medical and remodeling expenses listed as exhibits at the November 1, 2001 preliminary hearing and further modified to require respondent to provide the services listed in Ms. Morris's life-care plan for 5 years. Moreover, the claimant has met his burden of proof to establish the seizures were causally related to the accidental injury and hospitalization expenses and medications for the seizure condition are to be paid by respondent upon presentation of itemized billings. The ALJ's determination that respondent provide claimant regular consultations with a neurologist as recommended by Dr. Abrams is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Cowger, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge